

## **RESPONSIVENESS SUMMARY**

### **Notice of Intent to Revoke the Environmental Disposal Systems, Inc., Hazardous Waste Management Facility Operating License**

**Environmental Disposal Systems, Inc.  
Citrin Drive Facility in Romulus  
MIR 000 016 055**

**July 20, 2009**



**Prepared By:  
Hazardous Waste Section  
Waste and Hazardous Materials Division  
Michigan Department of Environmental Quality**

## INTRODUCTION

On August 27, 2008, the Michigan Department of Environmental Quality (MDEQ) issued a Notice of Intent to Revoke (NOIR) Environmental Disposal Systems, Inc.'s (EDS) Hazardous Waste Management Facility Operating License (Operating License) for the aboveground storage and treatment operations at its facility located at 28470 Citrin Drive in Romulus, Michigan. A show cause hearing was held on October 17, 2008, and on November 8, 2008, it was determined that the MDEQ had the legal and factual basis to proceed with the license revocation process. The Operating License was issued on December 27, 2005, pursuant to Part 111, Hazardous Waste Management, of Michigan's Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (Act 451), and its administrative rules, Michigan Administrative Code R 299.9101 *et seq.* On April 23, 2009, the MDEQ, Waste and Hazardous Materials Division (WHMD), conducted a public hearing to solicit comment regarding the NOIR.

The comment period associated with the public hearing ended on May 8, 2009, and included both oral comments received at the public hearing and written and voice mail comments received outside of the public hearing. Oral comments were received from 40 commenters. Written or voice mail comments were received from 38 commenters, some of which provided oral comments at the public hearing as well.

Pursuant to R 299.9519(11) an operating license may be revoked if the MDEQ finds (1) noncompliance by the licensee with applicable laws and rules and the license, (2) the licensed activities endanger human health or the environment, or (3) the owner or operator failed in the license application or issuance process to disclose fully all relevant facts or at any time misrepresented any relevant facts.

This Responsiveness Summary contains the MDEQ's responses to all comments received at the public hearing and during the public comment period relating to the potential Operating License revocation and the criteria the MDEQ is authorized to evaluate relative to the revocation process.

The comments have been summarized, and similar comments have been grouped together. The comments are presented in *italics* while the responses are presented in regular type following each comment.

## COMMENTS

### A. Transfer of the Operating License

*Nine commenters submitted comments against the transfer of the Operating License to another entity stating that any new entity wishing to operating the facility should be required to go through the permitting and licensing process from the beginning.*

While some persons provided comment on the potential transfer of the Operating License to a new entity, the purpose of this public participation process is to take comment on the potential revocation of the existing Operating License. As such, the MDEQ will not be responding to comments related to the transfer of the Operating License. Please be advised that while the MDEQ has received a request from RDD Investment Corporation (RDD) to transfer the Operating License to Environmental

GeoTechnologies (EGT), the MDEQ has taken no action on the transfer request. Any action on the transfer request will involve additional public participation independent of the potential Operating License revocation public participation process, whereby issues such as future facility personnel, qualifications, and ownership would be appropriately addressed.

B. Program and License Noncompliance

1. *Two commenters expressed concern regarding the local hazardous materials team's willingness and ability to address incidents associated with the facility, indicating that at a recent town hall meeting regarding the facility, both the city of Taylor and city of Romulus fire departments refused to take any responsibility in the event of any fires or spills at the facility suggesting that the Wayne County Airport Authority would do the work.*

Conditions II.H and I, along with Attachment 5, Contingency Plan, of the Operating License, specify the requirements for, and actions required in, the event of an incident at the facility. As part of licensure, the facility was required to provide copies of the Contingency Plan and preparedness and prevention information to various local responders, including the City of Romulus Fire Department, in order to establish arrangements for service. This was done by the facility.

2. *One commenter indicated that observations from the facility's property lines indicate that the owner does not have all the required spill control equipment required by the plans and questioned whether the state deleted this requirement.*

The commenter did not identify what type of spill control equipment appeared to be missing. As such, an equipment-specific response is not possible. The MDEQ has not changed the requirements regarding maintenance of spill control equipment. Part II, Conditions H and I, and Attachment 5, Contingency Plan, of the Operating License identify the requirements regarding spill control equipment. Compliance inspections have not identified any violations regarding this matter.

3. *One commenter expressed concern regarding documentation that the facility has received radioactive waste and wondered if associated records were available to the public.*

Attachment 7, List of Acceptable Hazardous Wastes, of the Operating License, identifies the types of wastes that may be received on-site. Receipt of radioactive waste is expressly prohibited by Conditions III.B.3 and IV.B.2 of the Operating License. Documentation regarding wastes

shipments is required by the Operating License under the manifest, Waste Analysis Plan, and operating log requirements. The operator is required to maintain these documents at the facility and have them available for inspection by the MDEQ inspector at all times. The Operating License that outlines these requirements is available at both the WHMD Lansing Office and the Southeast Michigan (SEMI) District Office and at the Romulus Public Library. Copies of all manifests are available for public viewing at the WHMD Lansing Office. Compliance inspection reports are available at the SEMI District Office. No receipt of radioactive wastes has been identified as a result of compliance and enforcement inspections or manifest processing. Compliance inspections have not identified any violations regarding this matter.

4. *One commenter asked if the tanks and piping on-site had been pressure tested as is required and where the results are located.*

The subject testing was conducted in conjunction with the initial certification of capability. Prior to the resumption of any hazardous waste operations at the facility, such testing will need to be conducted and the results and certification of capability provided to the MDEQ. The initial certification of capability and associated results are located at the WHMD Lansing Office.

5. *Two commenters questioned whether the groundwater, storm water, sanitary sewers, air, surface soils, and in-plant drains have been tested and the results thereof reported to the MDEQ and county of Wayne, in accordance with the Operating License.*

Part V and Attachment 11, Environmental Monitoring Sampling and Analysis Plan, of the Operating License, outline the environmental monitoring requirements for the facility. The facility is required to conduct a detection groundwater monitoring program on a quarterly basis and submit the data quarterly and a report annually to the MDEQ. Ambient air monitoring is required on a six-day sampling schedule, with monthly reporting to the MDEQ and Wayne County. Soil monitoring is required on an annual basis, and an annual report is required to be submitted to the MDEQ. Storm water discharge monitoring is required prior to, and during, any discharge, and data must be reported to the MDEQ within 60 days after sample collection. Sanitary sewer monitoring is required on a quarterly basis, with reporting of data to the MDEQ within 60 days after sample collection. Condition II.L.4 of the Operating License requires the facility to provide environmental monitoring information or data that it is required to generate pursuant to the license to authorized representatives of an environmental or emergency response department of the city of

Romulus or county of Wayne who request such information and data and who have jurisdiction over the facility.

For calendar year 2009, all groundwater, sewer, soil, and storm water sampling has been conducted. The only issue noted was that the sewer sampling data from February 27, 2009, which represents the first quarter sampling event, was not timely submitted. The submittal deadline was April 27, 2009, and the WHMD received the data on June 26, 2009.

6. *One commenter asked if the owners have conformed to the requirements of the Community Agreement and whether or not the MDEQ has enforced those requirements.*

Condition II.V and Attachment 13, Community Mitigation Agreement, of the Operating License, require compliance with the Community Mitigation Agreement. The agreement establishes 26 conditions, not all of which are the direct responsibility of the facility. A review of the conditions suggests that the focus of the comment is Conditions 4 to 24, some of which are facility-specific and some which apply more generally to the Environmental Concerns Association (ECA) or the community. The facility has complied with facility-specific Conditions 6, 8 to 11, 14, 16 to 18, 20, and 21. The remaining conditions, Conditions 4, 5, 7, 12, 13, 15, 19, and 22 to 24, pertain more generally to the ECA and community. The MDEQ has not received any complaints relative to these conditions. Pursuant to Condition 3 of the agreement, the conditions therein cease when the facility is no longer operating or accepting wastewaters for disposal. Thus, the conditions of the agreement have not applied since November 2, 2006, when the MDEQ ordered the suspension of operations at the facility.

7. *Several commenters supported license revocation based on the violations of the Operating License and other noncompliance with Part 111 and its rules. The commenters stated that the facility has a history of noncompliance, that the cumulative violations necessitate revocation even if individual violations may not, that legal grounds exist for revocation, and that the arguments proffered by RDD at the Roger's hearing were insufficient to change the state's position.*

*The commenters specifically identified violations associated with the (1) untimely adjustment to the cost estimates for closure/postclosure, (2) lack of continuous monitoring records, (3) lack of quarterly reports, (4) lack of equipment/system tests, (5) failure to conduct pressure buildup monitoring, (6) failure to submit sanitary sewer discharge and groundwater monitoring data, (7) releases of hazardous waste, (8) failure to retain injection records, (9) failure to have a trained operator on-site during*

*injection, (10) failure to continuously secure the facility, and (11) failure to give advance notice and receive proper approval for the transfer of ownership and operation of the facility.*

*With respect to the releases of hazardous waste and failure to have a trained operator on-site during injection, the commenters note that EDS's failure to minimize the potential releases or risks caused by the lack of personnel at the facility and to timely notify the state of the releases is incurable. They further stated that if the MDEQ had not actually inspected the facility, it would never have been aware of the severity of EDS's noncompliance. The commenters note that one of the releases contained various acids and heavy materials and that the continued release of these acids could have seriously affected the structural components of the facility and endangered the environment had the release not been halted by the actions of the MDEQ.*

*They additionally commented on the failure of EDS to continuously secure the facility, noting that the MDEQ observed that the gate to the facility was left open. RDD claims that it was of little concern due to the existence of security cameras. RDD does not, however, allege that anyone was actually watching those cameras. The cameras would be of little assistance had terrorists entered the unlocked gate and created an acute hazard to the community. Closing and locking the gate as well as having a watchman present at the gate are fundamental to providing for the safety of the community.*

*With respect to the failure to give the required advance notice and receive proper approval for the transfer of ownership and operation of the facility, they commented that RDD claims that it had no control of EDS's failure to notify the state of its proposed transfer, yet RDD acknowledges that as early as late October it had the cooperation of EDS to allow for the orderly transfer of its assets to RDD. RDD could have required, or even drafted on EDS's behalf, a notice to the state prior to the November 6, 2006, assignment.*

*Lastly, the commenters further commented that the reason for the Roger's hearing was to provide the "licensee, with notice of the basis for the contemplated modification or revocation, the opportunity to show compliance with all lawful requirements to retain the license." In the present case, the licensee never appeared and even if it did appear, it could not show that it has cured all of the violations.*

The MDEQ identified violations in the program areas noted by the commenters and, after review, determined that the noncompliance in these program areas as well as in other areas provided sufficient legal and

factual basis under the first two criteria noted above to initiate the license revocation process.

8. *One commenter submitted comments in opposition to license revocation stating that such an action is based on previously resolved violations and violations that cannot be corrected and does not consider that RDD discharged many of EDS's obligations. Additionally, the commenter suggested that other enforcement mechanisms, such as a consent order, would be more appropriate in this case.*

As an owner, RDD is responsible under Part 111 and its rules for the violations at the facility. However, the license revocation proceedings deal with the failure of EDS to comply with the terms of the Operating License and with Part 111 and its rules. The NOIR identifies EDS's failure to transfer the Operating License; EDS's failure to notify the Chief of the WHMD of anticipated noncompliance; EDS's failure to minimize releases and to timely report releases; EDS's failure to meet the financial requirements of Part 111; and other operating record, monitoring, and reporting violations that support the revocation of the Operating License.

The MDEQ has identified EDS's failure to properly transfer the Operating License, which in turn lead to EDS's failure to notify the Chief of the WHMD of anticipated noncompliance, as one basis to proceed with revocation. Based on the information submitted by the commenter, EDS approached the Detroit Police and Fireman Pension Board (Board) for additional funds in early October 2006, and on October 19, 2006, the Board directed counsel to secure its investment and transfer the Operating License from EDS to the Board in accordance with applicable state regulations. In order to comply with applicable state regulations, the licensee would have to request the transfer. Despite the direction of the Board; the occurrence of releases from both wells on October 23 and 26, 2006; the October 25, 2006, notification to EDS that it had defaulted on its loan; and the MDEQ's November 2, 2006, letter suspending hazardous waste treatment and operations and receipt of any waste, the MDEQ was not contacted regarding the Board's desire to secure a transfer of the Operating License. Instead, the Board proceeded to take control of the facility on November 7, 2006, without notifying the MDEQ. The commenter stated that RDD contacted the MDEQ immediately upon taking control of facility, as opposed to prior to the contemplated move, and "as soon as practical." The MDEQ did not receive written notification until December 14, 2006, in violation of the conditions of the Operating License and Part 111 and its rules.

The second violation supporting revocation of the Operating License is EDS's failure to minimize releases and to timely report releases. The

commenter indicated that the well leaks were salt water and were determined not to contain a hazardous waste. The material released either into the sump, air, or onto the ground was considered a listed hazardous waste and was to be managed as such pursuant to R 299.9203(1)(c). (NOTE: The material mixed with listed hazardous waste constituents previously injected into the well and, therefore, under R 299.9203(1)(c) is a hazardous waste). The Operating License requires both immediate oral reports and written reports within five days of such releases to the Chief of the WHMD. The WHMD did not receive an immediate verbal report of the release and did not receive a written report until mid-December 2006.

The MDEQ also identified EDS's failure to meet financial capability requirements as support for revocation. The commenter asserts that the MDEQ's assertion that financial capability requirements were not met is erroneous. At the time of the NOIR, EDS had failed to adjust the closure cost estimate for inflation and maintain financial assurance for closure in the appropriate amount. EDS also failed to maintain the necessary liability coverage. The MDEQ informed EDS and RDD of this fact in a November 2008 Notice of Violation. While the financial capability requirements were eventually met in January 2009, failure to meet the financial capability requirements was still a violation of the Operating License and Part 111 and its rules. The MDEQ's statements in the NOIR were not erroneous.

The NOIR also identified EDS's lack of sufficient security as a violation supporting revocation. The commenter suggests that on the two occasions that the gate was observed to be open, the gate was under surveillance. This claim is not consistent with the MDEQ inspector's observations nor was this suggested by facility personnel at the time of the inspections.

The NOIR also cites EDS's failure to comply with operating record, monitoring, and reporting requirements as support for revocation. The commenter suggests that modifications to the ambient air monitoring program and permit were coordinated with the MDEQ, Air Quality Division (AQD), on August 22, 2008. There have been no approved modifications to the program. The AQD identified concerns with respect to the monitoring that had been conducted and the resulting data and notified RDD in writing that no modifications are being sanctioned. While the commenter states (on page nine of their statement) that RDD was performing the monitoring and oversight obligations of various federal and state regulators, the MDEQ's inspections noted that ambient air monitoring was not being conducted in accordance with the Operating License. This fact was acknowledged by RDD.



The commenter alleges that the MDEQ erroneously stated that EDS failed to submit certain monitoring reports and that all available reports for 2006 and all required reports for 2007, 2008, and the applicable portions of 2009 have been provided to the Chief of the WHMD. The NOIR identified violations associated with reports that were not submitted on a timely basis and reports that were not submitted at all. The information in the NOIR was not erroneous. While some of the reports may have been obtained at this point in time, the failure to timely provide the data is a violation. Many of the reports were submitted late, and some reports were not submitted at all. RDD acknowledged that some of the reports were not available. The WHMD has yet to receive the groundwater monitoring reports for the first two quarters of 2007, the sewer monitoring reports for the first three quarters of 2007, and the annual soil sampling report for 2007.

With respect to EDS's underground injection control (UIC) permits, the commenter suggests that the facility has no obligation to get or hold UIC permits to have a Part 111 license. Condition I.E.2 of the Operating License requires the maintenance of "all facilities and systems of treatment and control (and related appurtenances)" as required by Title 40 of the Code of Federal Regulations, Section 270.30(3). The termination of EDS's UIC permits resulted in the inability of EDS to operate or maintain the UIC wells and, as a result, the inability of EDS to operate a system of treatment and control as is required under the Operating License. Contrary to the commenter's suggestion, the MDEQ has never stated that the Operating License would automatically terminate as a result of the termination of the UIC permits.

9. *One commenter stated that noncompliance continued after November 6, 2006, while RDD was the owner and that not all of the violations identified after this date were satisfactorily addressed or addressed within the time frames mandated by the state.*

The NOIR and this public comment period pertain to the revocation of the EDS Operating License for EDS's violations of the Operating License and Part 111 and its rules. However, the MDEQ has identified various violations at the facility after November 6, 2006, as denoted in Letters of Warning and Violation Notices issued as a result of compliance inspections and follow ups. Correspondence related to these violations is publicly available at the WHMD SEMI District Office.

10. *One commenter submitted comment indicating that RDD unlawfully attempted to transfer the Operating License and should not be permitted to confuse the facts or benefit from its actions nor claim that it had a valid*

*Power of Attorney coupled with an interest. The commenter further stated that RDD argues "exigent circumstances" kept it from notifying the MDEQ and the U.S. Environmental Protection Agency (U.S. EPA) for over a month of either its intent to take control of the facility or the actual improper assignment of the Operating License. RDD was legally required to give such notice. If RDD was concerned about the declining capabilities of EDS in September and October, it is not clear why they did not work with the MDEQ on a legal solution prior to taking the assignment in November without notice to the MDEQ.*

Condition 1.E.1(i) of the Operating License requires that "[t]he licensee shall obtain the approval of the Chief of the Waste and Hazardous Materials Division by a modification to the license, prior to transferring ownership or operation of the facility to another person." Additionally, R 299.9522 requires that new owners provide notice of the transfer of ownership or operational control of a facility to the Director of the MDEQ no later than 90 days before the scheduled change in ownership or operational control. The MDEQ has identified the failure of the licensee and the new owners to comply with R 299.9522 and with the conditions of the Operating License as grounds for supporting the MDEQ's actions to revoke the EDS Operating License.

C. Detroit Police and Fireman Pension Board and Investors and EGT

1. *Seventeen commenters provided comments indicating that the substantial loss of money by the Board, the primary investor in the facility, should not be a factor or consideration by the MDEQ in determining whether or not to proceed with revocation of the license. While these commenters expressed sympathy over the Board's monetary loss, they pointed out that the Board made an informed decision on a poor, questionable investment and had knowledge of the risks associated with the investment from the start. Yet, the Board continued to invest money into the facility despite being asked by RECAP [Romulus Environmentalists Care About People] to stop putting money into a "black hole."*

*A few commenters, however, indicated that the facility should be allowed to operate so as to not burden or penalize the Board and to allow the Board to recoup its substantial investment.*

As noted above, there are three criteria that the MDEQ considers in determining whether to proceed with the license revocation process. The funds invested by an investor and the losses or gains associated with that investment are not included in the criteria and are not being considered by the MDEQ. Lenders assume inherent risk when making loans and have the necessary responsibility to monitor the activities associated with loans

to protect their interests. The MDEQ's files show that the facility was made aware of various areas of noncompliance in as early as 2006. The MDEQ is not responsible for informing lenders or investors of noncompliance at hazardous waste management facilities.

2. *Two commenters suggested that enforcement action against RDD has the effect of penalizing the Board, which is wrong. The commenter further stated that the Board went to great expense to secure the facility and meet various other requirements such as getting the waste off-site. Additionally, EGT spent significant amounts of money and posted closure bonds. The commenter indicated that the MDEQ should not revoke the license but rather transfer the license to EGT.*

The MDEQ is obligated by law to enforce the requirements of Part 111 and its rules irrespective of the entity responsible for committing program violations. The Board, as the primary investor and ultimate assignee of the facility, has responsibility for compliance with Part 111 and its rules. The MDEQ understands that the Board expended funds to meet Operating License requirements, including securing the facility and shipping the waste off site. However, these actions were not optional but were required of the Board as the facility owner.

As previously stated, the transfer of the Operating License to EGT is not the subject of the public hearing. The MDEQ acknowledges that EGT is a third party that has an apparent agreement with RDD to purchase and operate the facility provided, in part, that the Operating License is transferred. The MDEQ is not a party to that agreement, and the MDEQ has made no guarantees that the Operating License will be transferred. Any money that EGT expended towards that end was done on a voluntarily basis, independent of any formal ownership or operational control of the facility, and without any guarantees from the MDEQ. EGT always had, and continues to have, the ability to pursue its own license for the facility.

D. Need for the Facility

*Sixteen commenters provided comment questioning the need for the facility either now or in the future given the emphasis on less waste generation, the fact that a larger underground injection well facility in northern Ohio is operating at less than 50 percent capacity and laying off personnel, and 90 percent of UIC permits across the country are experiencing reduction in volumes by 30-40 percent. These commenters indicated that despite RDD's claims that there is a need for the facility, they have letters from Ford Motor Company, General Motors Corporation, Chrysler Corporation, and others saying they do not need the facility. Additionally, correspondence with the major universities within*

*the state suggests they are not interested in using the facility even though the potential owners/operators say they are interested.*

Part 111 and its rules do not give the MDEQ the authority to consider need when evaluating a facility for siting or evaluating actions regarding licensure. Rather, the state's Hazardous Waste Management Program, as well as the federal Resource Conservation and Recovery Act of 1976, as amended (RCRA), Program, operate on a market-based approach and leave the profitability of the facility up to the owners/operators.

E. Miscellaneous

1. *One commenter questioned why Michigan does not require an independent or state observer at the facility as is the case with similar facilities in Ohio.*

Part 111 and its rules require independent certification of the facility with respect to capability and construction and require the state to conduct at least quarterly Hazardous Waste Management Program compliance inspections at the facility.

2. *One commenter questioned whether the U.S. EPA has done any testing after the leaks were detected, what the results were, and whether there has been any contamination to the water tables.*

It is important to note that the two referenced releases were associated with the well head (aboveground portion of the wells) and not the well itself (below ground). After the two October 2006 release incidents were identified, required testing was done by RDD to assess the potential impacts of the releases on human health and the environment. Based on data from both soil and groundwater testing, the releases did not result in exceedances of applicable cleanup criteria established under Part 201, Environmental Remediation, of Act 451. The Part 201 criteria are applied under Part 111. The leaks did not result in contamination of the water table. Additionally, under direction from the U.S. EPA and the MDEQ, Office of Geological Survey (OGS), mechanical integrity testing was conducted on both of the wells. Mechanical integrity testing was performed on the 1-12 well on October 14, 2008, and was witnessed by Mr. Sam Williams of the U.S. EPA. Mechanical integrity testing was performed on the 2-12 well on December 10, 2008, and was witnessed by Mr. Sam Williams of the U.S. EPA and Mr. Bruce Waldo of the OGS. Internal mechanical integrity was demonstrated in both tests. The results of all mechanical integrity tests are available at the OGS Lansing Office.

3. *One commenter questioned the types of treatment allowed at the facility and who oversees the treatment activities.*

The type of treatment required prior to injection is dependent on the waste type. Part IV of the Operating License stipulates the types of treatment that may be conducted, including (1) physical separation of oils from wastewater, (2) primary solids settling, (3) stabilization of sludges with lime slurry, (4) pH adjustment with NaOH to enhance solids removal, (5) polymer addition and floc formation, (6) floc removal, (7) filtration, (8) pH adjustment with H<sub>2</sub>SO<sub>4</sub>, (9) sludge thickening with diatomaceous earth, and (10) sludge dewatering. The Operating License requires that all of these processes be overseen by operators meeting the training requirements specified in Part 111 and its rules and be conducted in accordance with the Operating License and all applicable statutes and regulations.

4. *Two commenters questioned whether the geological studies had been conducted to ensure beyond a doubt that the wastes will not get into the water resources thus resulting in groundwater and surface water contamination.*

The Operating License regulates the surface operations at the facility. Under Part 111, the facility was designed and built to prevent, or contain, leaks and environmental monitoring is conducted to verify compliance. As part of the Part 111 construction permit and operating license application processes, the facility completed a hydrogeological study of the upper 100 feet of sediment. In terms of shallow groundwater, the facility is located on about 100 feet of clay that protects the bedrock aquifer. These studies indicated that groundwater and surface water contamination would not likely result from surface operations conducted in compliance with the Operating License.

Prior to obtaining the U.S. EPA UIC permits for the injection of waste, deep underground studies of the bedrock were conducted. The U.S. EPA UIC Permit Program and the OGS conducted a review of the studies. The studies were part of the permit application for the disposal wells and were submitted under Part 625, Mineral Wells, of Act 451, and are available at the OGS Lansing Office. Both agencies granted permits for the injection wells, accepting the position that the water resources would be protected by injection between 3,937 and 4,550 feet below the surface and under bedrock confining layers.

5. *Two commenters indicated that operation of the facility constitutes a trespass on citizen's property rights without their consent.*

The aboveground hazardous waste treatment and storage operations, which are regulated under Part 111 and its rules and the subject of this public participation process, are contained within the boundaries of the property now owned by RDD.

6. *Approximately 60 commenters provided comments indicating their general opposition to the facility due, in part, to its proximity to Detroit Metropolitan Airport, the Detroit River Watershed and associated fresh water resources, and densely populated areas; the likelihood that Canadian and out-of-state wastes will be accepted at the facility; the possible impact on traffic and potential related risks to infrastructure; decreasing land and property values in the area; and other similar concerns. These commenters supported revocation of the license.*

The majority of these issues were vetted and addressed by either the MDEQ or the Site Review Board during the construction permitting process associated with the facility, under the authority given to them pursuant to Part 111 and its rules. The facility was found to be constructed in compliance with the applicable requirements, and special conditions were added to the construction permit and Operating License to address such concerns. As far as the acceptance of Canadian and out-of-state waste is concerned, although the MDEQ has the authority to authorize the types of waste that may be accepted at the facility, it cannot regulate where the wastes come from. Limiting the later would be a violation of the Interstate Commerce Clause of the United States Constitution.

7. *One commenter asked whether there is management on-site that has managed a commercial hazardous waste facility or injection well previously and whether the state requires operators of deep wells and treatment operations to be licensed.*

This public comment period is associated with the aboveground hazardous waste storage and treatment operations. As part of the licensing application process, the facility operator is required to include information regarding the qualifications of key technical personnel. That information is compared to the personnel training requirements in Part 111 and its rules that adopt, by reference, the federal RCRA requirements. The MDEQ is not aware of any specific licensure requirements for operators of treatment operations.

Michigan Compiled Law (MCL) 324.62509(1) requires that, after the Supervisor of Mineral Wells has authorized use of a well for disposal, operation of the well is regulated under Part 131, Water Resources Protection, of Act 451. Among other things, MCL 324.3110(1) requires

that "Each industrial or commercial entity that discharges liquid wastes [u]nderground [o]ther than through a public sanitary sewer [s]hall have waste treatment or control facilities under the specific supervision and control of persons who have been certified by the department as properly qualified to operate the facilities. The department shall examine all supervisory personnel having supervision and control of the facilities and certify that the persons are properly qualified to operate or supervise the facilities."

The MDEQ offers an annual Industrial/Commercial Wastewater Certification Examination, typically in November. Information regarding the exam is available on the Internet at: [http://www.michigan.gov/deq/0,1607,7-135-3308\\_3333\\_4171-10101--,00.html](http://www.michigan.gov/deq/0,1607,7-135-3308_3333_4171-10101--,00.html). A list of operators currently certified for deep well injection is located at: [http://www.michigan.gov/deq/0,1607,7-135-3308\\_3333\\_4171--,00.html](http://www.michigan.gov/deq/0,1607,7-135-3308_3333_4171--,00.html). Mr. John Frost, Mr. Don Anderson, and Mr. Yasser Mahmoud, employees of the RDD who are involved in the daily operation of the wells, currently hold the A2g certification for operation of deep injection wells.

8. *One commenter asked when the MDEQ was advised that the licensee had "disappeared."*

The WHMD and OGS conducted a joint inspection of the facility on November 22, 2006, during which they were informed that EDS had relinquished operational control of the facility and surrendered all facility assets to RDD. On December 15, 2006, the WHMD received a letter, dated December 14, 2006, from Mr. Ronald A. King of Clark Hill PLC, legal representative of the Police and Fire Retirement System of the City of Detroit (DPFRS) and its wholly owned subsidiary, RDD, that on or about November 9, 2006, RDD received an assignment of property and assets from Romulus Deep Disposal Limited Partnership, Remus Joint Venture, and EDS.

9. *One commenter asked if secondary access is still required for fire trucks as the commenter observed that public files do not show proof of ownership or who controls the land required for secondary access at the facility.*

Condition II.H.5 of the Operating License specifies that the licensee shall maintain an unobstructed alternate emergency access/egress road to the site, either along the railroad between Inkster Road and the southeast corner of the site, or across the railroad south to Wick Road. The licensee is not required to own the land; rather the licensee is required to maintain a contractual agreement with the owners such that access to the land is

available at any time. Proof of such agreements was provided to the MDEQ in advance of licensure.

10. *One commenter questioned whether the MDEQ would require recertification of the facility by an independent party after all of the time that has passed while one commenter suggested that such recertification was not required.*

Certification of construction and certification of capability for managing hazardous waste, respectively, by a registered professional engineer are required by R 299.9508(1)(c) and (d). MCL 324.11123(3) provides the MDEQ with the ability to require additional certification periodically during operation. The MDEQ would require updated certifications should hazardous waste storage or treatment operations resume at the facility.

11. *One commenter expressed concern that the prior owner has apparently not paid the facility's local taxes or construction permit and inspection fees and wondered who will pay the said charges.*

Payment of local taxes, local permit fees, and local inspection fees are issues outside of the jurisdiction of the MDEQ and the requirements of the Operating License. To the extent that this comment relates to payments that are due to the MDEQ under Part 111 and its rules, or the Operating License, the current facility owner is responsible for payment of the user charges. User charges were due for 2005, 2006, 2007, and 2008. Only the user charges for 2005 and 2008 have been paid.

12. *One commenter indicated that no hazardous waste has been released from the facility as suggested by others, only brine. Other commenters indicated that hazardous waste had been released from the facility as outlined in incident reports that state hazardous waste was released.*

As stated above and in the MDEQ November 2, 2006, letter to EDS, pursuant to R 299.9203(1)(c) the material pumped into well 2-12 during the mechanical integrity test that was released to the well house, into the sump, and onto the ground was considered a hazardous waste because it mixed with listed hazardous waste constituents previously injected into the well. The same application of this rule applies to the release from well 1-12 on October 23, 2006. Thus, the material resulting from both incidents was required to be handled as a listed hazardous waste consistent with the requirements of Part 111 and its rules.

13. *Three commenters indicated that they were not concerned about the facility as it was well designed and is provided with 24-hour security and trained personnel.*



In reviewing the license application, the MDEQ determined that the aboveground hazardous waste storage and treatment facility was designed in accordance with the construction permit and licensing requirements. However, the MDEQ has previously notified the facility about violations of security requirements and concerns regarding staffing and personnel training.

14. *One commenter submitted comments in opposition to Operating License revocation stating that such an action is inconsistent with "representations" made by the MDEQ and that the Operating License revocation does not take into consideration a draft Operating License transfer request. The commenter further questioned if the MDEQ ever intended to enter into a consent order with RDD and transfer the Operating License, suggesting that the MDEQ had always intended to initiate revocation proceedings and was abusing its discretion in that license revocation represents a disproportionate enforcement action.*

The MDEQ did not make, and has not made, any guarantees with respect to the transfer of the Operating License. While the MDEQ correspondence did outline what actions would be necessary before an Operating License transfer could occur, the MDEQ never stated that the license transfer would be approved. Part 111 requires public participation prior to a major modification of a license. Additionally, an October 27, 2007, letter to EDS and RDD noted, in pertinent part, that the MDEQ may proceed with license revocation because there are unresolved issues of noncompliance with Part 111 and its rules and the Operating License. At no time did the MDEQ state that it would not initiate revocation proceedings.

The MDEQ did not conduct, or commit to conduct, a full review of the March 9, 2007, draft transfer request or modifications thereto as it was not a formal request from the licensee. RDD was advised that any comments made by the MDEQ were informal and that a formal request from the licensee was necessary. The MDEQ did not in any way preclude the licensee from submitting a formal transfer request. In fact, the MDEQ's March 27, 2007, letter stated that the licensee may submit a formal request to transfer the license. However, a formal transfer request was not submitted to the MDEQ until February 11, 2009, twenty-three months later; six months after the issuance of the NOIR.

The MDEQ met with RDD over the course of approximately two years and various courses of action were discussed; however, there was no predetermined course of action. At no time did the MDEQ promise or guarantee transfer of the Operating License nor did it imply that it would not initiate license revocation proceedings. Moreover, the MDEQ

maintained that only the licensee could make such a request. The MDEQ directed significant correspondence to both EDS and RDD given their dual liability as licensee and owner.

After two years, the facility is still not fully compliant with Part 111 and its rules and the Operating License.

15. *One commenter suggested that the Operating License should not be revoked because no Part 111 operating license has ever been revoked by the MDEQ. The commenter indicated that the MDEQ is relying primarily on EDS's failure to transfer the Operating License prior to relinquishing operational control of the facility and surrendering all facility assets as justification for proceeding with the license revocation process.*

The MDEQ acknowledges that no Part 111 operating licenses have previously been revoked under the state's authorized program. However, previous actions by the MDEQ are independent of the agency's obligation to evaluate EDS's compliance with Part 111 and its rules and the Operating License relative to the criteria to be considered in determining whether revocation of an operating license is warranted and supported by law. After considering the numerous violations identified, including failure to comply with the Operating License transfer requirements, the MDEQ initiated the revocation process. EDS is the first licensee to abandon its Operating License during its operational term in the history of the state program. The MDEQ, in initiating the revocation process, is exercising authority clearly provided to it under Part 111 and its rules.

16. *One commenter suggested that the Board should be applauded for its actions as it could have just left responsibility for the facility with governmental agencies. The party further states that RDD was an exemplary licensee and went above and beyond its regulatory requirements.*

The RCRA Program and Part 111 and its rules provide for strict liability in that liability runs with the land. Once the loan default occurred, the Board became the owner of the facility. The Board then created RDD to take over control of the facility. While the acknowledgement and assignment agreement may have expressly stated that RDD was not assuming any liabilities of EDS, under Part 111 and its rules and the RCRA, RDD assumed responsibilities as an owner regardless of what was stated in the assignment agreement.

RDD is not the licensee. Rather, RDD is the owner and has all of the obligations that go along with ownership. To suggest that RDD completed these actions only to affect the transfer of the Operating License fails to

acknowledge that RDD had these obligations whether or not it pursued a transfer of the Operating License. RDD conducted actions it was obligated to conduct as an owner. The commenter contends that had the revocation of the Operating License occurred at the time the violations supporting revocation had occurred, RDD would not expended monies to remove waste and close up the facility. As owner, RDD would still have been obligated to affect closure of the facility. To go above and beyond regulatory requirements suggests that RDD was, and is, in full compliance with Part 111 and its rules and the Operating License. As of this date, EDS and RDD have failed to demonstrate that the facility is in full compliance with Part 111 and its rules and the Operating License. Inspections continue to identify noncompliance.

17. *One commenter stated that the MDEQ should withdraw the revocation proceedings as the proceedings hold up the transfer process thereby causing further noncompliance on the part of RDD with respect to Part 111 and its rules and the Operating License. The commenter further suggests that the MDEQ could have been working on the transfer of the Operating License instead of demanding compliance and remedial activities from RDD since the time RDD took possession of the facility.*

The MDEQ did not hold up any process or cause EDS's noncompliance with the Operating License.

The abandonment of the facility and failure to properly transfer the Operating License has complicated the MDEQ actions as it relates to the facility. The MDEQ actions did not prohibit the submittal of a request to transfer the Operating License by the licensee or the request for a new operating license by a different entity. In fact, during a February 15, 2007, meeting, the MDEQ outlined the types of items that would need to be addressed in such a transfer request. The MDEQ informed EDS and RDD via a March 27, 2007, letter that the licensee could proceed with the submittal of the Operating License transfer request. The possibility of an Operating License revocation was addressed in the October 29, 2007, correspondence to both EDS and RDD. Draft orders and opportunities for compliance followed. The MDEQ issued the NOIR. A show cause hearing was held on October 17, 2008, and it was later determined whether the MDEQ would proceed with revocation of EDS's Operating License.

F. Relationship of EDS and RDD and Ability to Take Various Actions

1. *Several commenters stated EDS is the licensee, not RDD or EGT. Since EDS no longer exists as an ongoing entity, but is a defunct entity that cannot hold an operating license, there is no licensee to raise any*

*objection to the proposed revocation or to affect the transfer of the Operating License to anyone. With no one to affect the transfer of the Operating License, the MDEQ's only course of action is to revoke the Operating License and require any new entity wishing to operate the facility to proceed with a new construction permit application.*

The MDEQ is seeking revocation of the EDS Operating License for violations of numerous license requirements, including the failure of EDS to properly affect a transfer of the Operating License prior to abandoning the facility. Although EDS may no longer be an operating entity, the MDEQ must act pursuant to the requirements of Part 111 and its rules and the Administrative Procedures Act, 1969 PA 306, as amended (APA). As part of the requirements set forth by the APA and Part 111 and its rules, the MDEQ held a show cause hearing on October 17, 2008, and held a public hearing on April 23, 2009. The MDEQ will pursue a revocation hearing in front of an administrative law judge in accordance with Part 111 and the APA.

2. *One commenter stated that RDD's arguments have been inconsistent throughout the process noting that on page 13 of the Roger's Brief, RDD refers to itself as the assignee of the Operating License and in other places states that it has the authority to act through its "power of attorney" granted in the loan documents. They are inconsistent positions that lead to the same legal conclusion. If RDD is the "assignee," they are a party to an unlawful and improper action. However, if they are acting by virtue of the power of attorney, the only action permitted would be to unwind the corporation. The actions RDD took at the property, and subsequently, go far beyond a mere winding up of the corporation. Additionally, under the doctrine of agency, that power terminated upon dissolution. Knowing that their arguments were without merit, why did RDD continue to seek EDS's cooperation in executing documents?*

The MDEQ can speak only to its actions during this process. The MDEQ has no knowledge as to why RDD or EDS pursued the course of actions that they pursued. The MDEQ has provided the opportunity for all interested parties to provide comments and will evaluate those comments, as well as any perceived inconsistencies in those comments, as it determines whether to proceed with revocation of the EDS Operating License.

3. *One commenter stated that RDD took ownership of a facility that is regulated under the RCRA and that they now have ultimate liability for the facility, period. Pursuant to environmental law, owners and operators of property regulated by the RCRA are liable. Thus, although RDD is the owner of the property, the DPFRS is the operator. The RCRA contains*

*only a lender liability provision like the federal Comprehensive Environmental Response, Compensation, and Liability Act, 1980 PL 96-510 (CERCLA), with respect to underground storage tanks. Therefore, all of RDD's actions for the most part were required by law by virtue of its taking title to the facility. They are not being treated unfairly; they are a liable party and the termination of the EDS UIC permits is irrelevant.*

*In EGT's application, they claim they are the owner of the Property. If this is true, there are so many inconsistent and misleading statements being made to both the state and federal agencies that the application and/or RDD's assertions should be completely discounted and both parties should be denied access to the UIC permits; however, if in fact they are an owner, they are now a RCRA-liable party as well.*

This comment appears to relate in part to the potential transfer of the Operating License to RDD or EGT in the future. As previously noted, the purpose of this public participation process is to take comment on the potential revocation of the existing Operating License. As such, the MDEQ will not respond to comments related to the transfer of the Operating License.

Additionally, issues as to RDD's liability as an owner or operator of the facility are outside the scope of this public participation process regarding the revocation of the EDS Operating License. The MDEQ will continue to require that RDD, EGT, and all other parties comply with all state and federal statutes and regulations that are applicable to them.

4. *One commenter stated that contrary to EGT and RDD's assertions, the MDEQ has not committed a "taking." EGT has no property rights whatsoever with respect to any granted license or permit. To date, the U.S. EPA has only delayed termination of the UIC permits to allow EGT to apply for its own permits. RDD's assignment of the permit was improper and this is uncontroverted. Revoking the EDS Operating License in no way deprives them of any property right. RDD still owns the property and RDD (or EGT) has the full right to apply, once the EDS Operating License is revoked, for a Part 111 construction permit and operating license for this facility.*

*Thus, as confirmed by the U.S. EPA, RDD had no legal rights to any permit. The mistaken belief by RDD that it could obtain a security interest in a governmental permit such as this was wrong. The state should not recognize RDD as an assignee.*

*The fact that EDS did transfer or assign the Operating License and that RDD acquired it are additional reasons why revocation of the Operating License is appropriate. The evidence shows that RDD knew this was unlawful and it intentionally concealed its actions from the state for over a month. RDD could, and did, perfect on its security interest (mortgage) and, thus, is the owner of a facility regulated under the RCRA. The differences between issues related to the Operating License and the obligations of an owner of the property are critical. The ownership of the property does not give rise to a real, or even perceived, property right in the Operating License.*

*Further, the assignment document that RDD claims put them in EDS's "shoes" is not a full and unconditional assignment. The assignment grants RDD only the rights but not the obligations of ownership. If the state is to permit this type of action, it is surely breaking new legal ground with respect to security interests in licenses to operate hazardous waste facilities.*

The EDS Operating License can only be transferred after the approval of the MDEQ and following the procedures provided for in Part 111 and its rules. The MDEQ has not recognized and, under Part 111 and its rules, cannot recognize EGT or EDD as the transferee or assignee of the EDS Operating License until the requirements of Part 111 and its rules, including an opportunity for public participation and comment, have been met.

As previously stated, issues as to RDD's liability as an owner or operator of the facility are outside the scope of this public participation process regarding the revocation of the EDS Operating License. The MDEQ will continue to require that RDD, EGT, and all other entities comply with all state and federal statutes and regulations that are applicable to them.

## **CONCLUSION**

This concludes the public participation process associated with the April 23, 2009, public hearing regarding the potential revocation of the EDS Operating License. The MDEQ has determined that it will proceed with the next step in the revocation process and will be filing a petition for a contested case hearing pursuant to Part 111 and the APA.